UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte WALTER HOWARD,
GARY SMITH and
JULIE MORRIS

Appeal 2007-0875
Application 10/774,692
Technology Center 1700

Decided: March 28, 2007

Before EDWARD C. KIMLIN, THOMAS A. WALTZ, and JEFFREY T. SMITH, *Administrative Patent Judges.*

WALTZ, *Administrative Patent Judge.*

DECISION ON APPEAL

This is a decision on an appeal from the Primary Examiner's refusal to allow claims 11-20, 22-29, and 31-33 as amended subsequent to the final rejection (*see* the Amendment dated April 11, 2006, entered as per the Advisory Action dated April 20, 2006). Claims 11-20, 22-29, and 31-33 are

the only claims pending in this application. We have jurisdiction pursuant to 35 U.S.C. §§ 6 and 134.

According to Appellants, the invention is directed to a process for making a sliced bread product comprising providing a bread slice with a crust portion, toasting the bread slice, compressing the toasted bread slice to about 40 to 60% of its original thickness, where the bread crust portion is cracked and the bread slice returns to at least 90% of its original thickness when the compression is removed (Br. 7). Independent claim 11 is illustrative of the invention and is reproduced below:

> 11. A process for making a sliced bread product comprising providing a bread slice with a crust portion, toasting the bread slice, and compressing the toasted bread slice effective to crack the crust portion without permanently and substantially flattening the bread slice, wherein the compressing without permanently and substantially flattening the toasted bread slice comprises compressing the toasted bread slice having an original thickness to a reduced thickness of about 40 to about 60% of the original thickness while compression is being applied so that the bread crust portion is cracked and the bread slice returns to at least 90% of the original thickness after the step of compressing.

The Examiner has relied upon the following reference as evidence of obviousness:

Ohmura	US 5,846,585	Dec. 8, 1998

ISSUES ON APPEAL

Claims 11-20, 22-29, and 31-33 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Ohmura (Answer 4).

Appellants contend that Ohmura discloses compression of baked untoasted loaves of bread, and even though it is taught that the loaves can be sliced, the reference discourages this practice (Br. 11).

Appellants contend that even though slicing is taught, Ohmura does not teach or suggest toasting individual slices followed by compression (Br. 12).

Appellants contend that Ohmura only discloses baking or semi-baking bread, not toasting, and Ohmura does not enable the compression of a single slice of toast or cracking of the crust (Br. 14-16).

The Examiner contends that Ohmura discloses compression of a food product as a treatment for decreasing the bulk, with restoration of the bulk after compression, and the food product may include bread slices and contain fillings (Answer 4-5).

The Examiner contends that Ohmura teaches a heat treatment of the bread, exemplified as baking, which will cause toasting (Answer 5-6).

Accordingly, the issues presented in this appeal are as follows: (1) does Ohmura teach or suggest treatment of a food product which includes sliced bread?; and, (2) does Ohmura disclose or suggest toasting of the sliced bread within the meaning of this word as recited in the claims on appeal?

We determine that the Examiner has established a prima facie case of obviousness based on the reference evidence, which case has not been adequately rebutted by Appellants' arguments. Therefore, we AFFIRM the sole rejection on appeal essentially for the reasons stated in the Answer, as well as those reasons set forth below.

OPINION

We determine the following factual findings from the record in this appeal:

(1) Ohmura discloses a process for providing a food having a decreased bulk suitable for storage where all the qualities, including bulk, can be restored by heating (col. 3, ll. 4-10);

(2) Ohmura discloses several embodiments where the process includes a heat treatment of the food product, compression to a decreased bulk of 0.01 to 0.9 times the original bulk, freezing or sealing, followed by restoration to the original bulk by heating (col. 4, ll. 8-18; col. 4, l. 50-col. 5, l. 19; col. 8, ll. 29-34);

(3) Ohmura teaches that the initial heat treatment of the bread includes baking or semi-baking, where semi-baking is a state not to be colored, exemplified as heating the bread to about 150° to 250°C for 5 to 30 minutes (col. 5, ll. 47-49; col. 6, ll. 25-42);

(4) Ohmura teaches that the bread may be subjected to slicing but it is most desirable to use the bread in its whole state (col. 6, ll. 44-64); and

(5) Ohmura also teaches that the technique of the invention is applicable to a bread which contains an edible filling material, such as a "specific food material *sandwiched* between foods such as breads" (col. 18, ll. 50-62, italics added; col. 36, ll. 23-24).

Implicit in any review of the Examiner's obviousness analysis is that the claim must first have been correctly construed to define the scope and meaning of each contested limitation. *See Gechter v. Davidson,* 116 F.3d 1454, 1457, 1460 n.3, 43 USPQ2d 1030, 1032, 1035 n.3 (Fed. Cir. 1997).

During proceedings before the Examiner, the claims are given their broadest reasonable interpretation consistent with the specification as it would have been understood by one of ordinary skill in the art. *See In re Morris,* 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997); *and In re Graves,* 69 F.3d 1147, 1152, 36 USPQ2d 1697, 1701 (Fed. Cir. 1995). The specification is always highly relevant to the claim construction analysis. Usually, it is dispositive since it is the single best guide to the meaning of a disputed term. *See Phillips v. AWH Corp.,* 415 F.3d 1303, 1316, 75 USPQ2d 1321, 1329 (Fed. Cir. 2005) (en banc). Even when obviousness is based on a single prior art reference, there must be a showing of a suggestion, reason, or motivation to modify the teachings of that reference. *See In re Kotzab,* 217 F.3d 1365, 1370, 55 USPQ2d 1313, 1316-17 (Fed. Cir. 2000). A reference must be considered not only for what it expressly teaches but also for what it fairly suggests. All disclosures of the prior art, including unpreferred embodiments, must be considered in determining obviousness. *See In re Burckel,* 592 F.2d 1175, 1179, 201 USPQ 67, 70 (CCPA 1979); *and In re Lamberti,* 545 F.2d 747, 750, 192 USPQ 278, 280 (CCPA 1976).

Applying the preceding legal principles to the factual findings on the record in this appeal, we determine that the Examiner has established a prima facie case of obviousness based on the reference evidence, when the claim language is properly construed. We further determine that Appellants' arguments do not adequately rebut this prima facie case.

We first construe the scope and meaning of the contested term "toasting" (*see* claim 11 on appeal). Appellants specifically define "toasted" to mean that "a bread slice is heated until browned by a heating system. A

'browned' bread slice is browner in color and contains less moisture than before heat treatment." Specification 4:28-30. Accordingly, we adopt this definition as our claim construction for the term "toasting" or "toasted."

In view of this claim construction, we agree with the Examiner that "toasting" as recited in the claims on appeal reads on the "baking" taught by Ohmura as the heat treatment for the food product (Answer 5-6). Ohmura teaches, as does the prior art, that "semi-baking" does *not* produce color in the bread (*see* factual finding (3) listed above and Ohmura, col. 2, ll. 6-7). Accordingly, we determine that this teaching would have suggested to one of ordinary skill in this art that "baking" does produce some amount of browning or color, thus encompassing the term "toasting" as construed above.[1]

We also determine that Ohmura teaches that the bread may be subjected to the treatment for decreasing its bulk (i.e., compression) after slicing, thus clearly suggesting to one of ordinary skill in this art that the compression may be employed on a single slice (*see* factual finding (4) listed above). Accordingly, since the compression taught by Ohmura accomplishes the same reduction in bulk as claimed, we determine that the same results will occur, namely cracking of the crust portion. Although

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[1] We note that Appellants claim toasting at a temperature of greater than 475°C for less than 60 seconds (*see* claims 15 and 16 on appeal) while Ohmura exemplifies baking or semi-baking the bread at 150-250°C for 5-30 minutes (col. 6, ll. 39-42). Although we note that these "toasting" conditions are only "one particular embodiment" of Appellants' process (Specification 3:6-10), we agree with the Examiner that the temperatures and times taught by Ohmura (302°F to 482°F) would certainly be sufficient to at least produce some browning of the bread and loss of moisture, thus reading on "toasting" as construed above (Answer 6).

Ohmura teaches that exposing the crumb portion by dividing (slicing) the bread is "not preferable" (col. 6, ll. 54-64; *see* factual finding (4) listed above), all disclosures of Ohmura, including unpreferred embodiments, must be considered in determining obviousness for what they fairly would have suggested to one of ordinary skill in this art. Whether the heat treatment is done before or after slicing, at least some portion of the bread slices will be "toasted" as construed above.

For the foregoing reasons and those stated in the Answer, we affirm the rejection of all of the appealed claims under § 103(a) over Ohmura. The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv)(2006).

AFFIRMED

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